NOT FOR PUBLICATION FOR UPLOAD TO WEBSITE

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Crim No.** 2002-158
	)	
RIEL CHARLESWELL,	)	
	)	
Defendant.	)	
	)	

ATTORNEYS:

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For the plaintiff,

Patricia Schrader-Cooke, Esq.
Assistant Federal Public Defender
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM OPINION

Moore, J.

On November 20, 2002, I heard argument on the defendant's motion to dismiss the charge against him, illegal reentry into the United States after previously having been deported, in violation of 8 U.S.C. § 1326(a). Charleswell ["Charleswell" or "defendant"], having been ordered deported twice before, now challenges the legality of the original deportation order, issued on November 7, 1991, and the July 24, 2001 reinstatement of the deportation order. At the November argument, I instructed the

parties to submit supplemental briefs on the motion. Upon consideration of the motions, supplemental briefs, and the evidence in the record, I will deny the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1967, Charleswell, a resident of the British Virgin Islands, immigrated to the United States, and became a permanent resident. On January 6, 1987, he was convicted in Maryland of state charges of possession with intent to distribute marijuana. Based on this conviction, the Immigration and Naturalization Service ["INS"] commenced deportation proceedings against Charleswell, pursuant to what was then section 241(a)(11) of the Immigration and Nationality Act of 1952 ["INA"], codified at 8 U.S.C. § 1251(a)(11) (rendering as deportable any alien convicted of a violation relating to a controlled substance).[1]

On November 7, 1991, at his deportation hearing, Charleswell conceded that he was deportable, but sought a waiver from deportation under then section 212(c) of the INA, 8 U.S.C. § 1182(c) (repealed April 1, 1997). At the time of the defendant's

[1] Since the date of Charleswell's deportation hearing, this section of the INA has twice been recodified. The former INA § 241(a)(11), referring to controlled substance violations, was redesignated as INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i), and was later transferred to and is currently found at INA § 237, 8 U.S.C. § 1227(a)(2)(B)(i).

deportation hearing, section 212(c) of the INA authorized the Attorney General, in his or her discretion, to waive the deportation of an otherwise deportable alien who had established a continuous, lawful domicile in the United States for seven years.[2] In his opinion denying Charleswell's request for relief, the immigration judge erroneously excluded the time that the defendant had spent living here in St. Thomas, apparently unaware that St. Thomas is part of the United States for immigration purposes.[3] The immigration judge's ignorance about St. Thomas also caused him to conclude that Charleswell would be ineligible for a waiver of deportation because the judge did not know that the defendant's relatives in St. Thomas constituted personal ties

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[2] At that time, section 212(c) read in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.

INA § 212(c), codified at 8 U.S.C. § 1182(c) (repealed 1996). Although this provision, on its face, applied only to exclusion proceedings, a longstanding interpretation of this section extended the Attorney General's discretion to otherwise deportable aliens. *See Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 358 (2001)(citing *Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976)). Section 212(c) was eventually repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-597 (1996), which also eliminated such relief for deportable aliens.

[3] The immigration judge noted that the defendant "left the United States to go to St. Thomas in August 1991 to work as a school teacher for the St. Thomas public school system" and consequently "ha[d] freely on his own left the United States to go St. Thomas to work and live." (Def.'s Mot. to Dismiss, Ex. 3 at 2.)

to people in the United States.[4] Unfortunately, Charleswell did not appeal the immigration judge's erroneous findings. He was deported on July 9, 1992. (Def.'s Mot. to Dismiss, Ex. 2 at 3.)

On March 20, 1997, Charleswell was arrested for having reentered the United States illegally. Officers found a handgun in his residence, and he was charged with illegal reentry by a deported alien and possession of a firearm by a convicted felon. Charleswell moved to dismiss the indictment, arguing that his earlier deportation was fundamentally unfair. The trial judge denied the motion, and Charleswell appealed his conviction. The United States Court of Appeals for the Fourth Circuit, while noting the immigration judge's failure to consider St. Thomas as part of the United States, nevertheless affirmed the conviction, concluding that Charleswell was not denied judicial review, and thus could not challenge his deportation order in a criminal prosecution under 8 U.S.C. § 1326(d). *United States v. Charleswell*, Crim. No. 97-4721, 1999 U.S. App. LEXIS 1774 at *5-7 (4th Cir. Feb. 8, 1999). The Court of Appeals determined, based on the transcript of the deportation proceeding, that Charleswell

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[4] The immigration judge found the defendant ineligible for section 212(c) relief because he failed to show "unusual and outstanding equities" warranting relief from deportation. Again, in reaching this conclusion, the immigration judge disregarded Charleswell's familial ties with relatives in St. Thomas, finding that, although the defendant "has an outstanding equity in the fact that he has been a permanent resident since 1967," this equity was mitigated because he "has not shown any personal ties to anyone in the United States." (*Id.*)

had not been deprived of his right to judicial review because the immigration judge informed him of his right to appeal and he elected not to pursue appellate review of his deportation order. *Id.*

On November 20, 2000, Charleswell's deportation was reinstated in accordance with section 241(a)(5) of the INA, 8 U.S.C. § 1231(a)(5), and he was removed from the United States on July 26, 2001. On March 15, 2002, Charleswell was again found in the United States, arrested, and charged in this case under 8 U.S.C. § 1326 with illegally entering the United States after previously having been deported.

Charleswell moves to dismiss the charge against him, challenging his original deportation as being "fundamentally unfair." In addition, he argues that the November 20, 2000 reinstatement of the deportation order under INA § 241(a)(5) is also flawed because it constituted an illegal retroactive application of the law.

II. DISCUSSION

A. Charleswell has not Established that he was Denied an Opportunity for Judicial Review of the Original Deportation Order of November 7, 1991

Charleswell argues that the original deportation was fundamentally unfair because the immigration judge erroneously

calculated the amount of time he had lived in the United States and thus improperly denied him relief under INA § 212(c). The government counters that the defendant is unable to establish that he was denied the right to judicial review, and therefore, that the original deportation order should not be suppressed.

Federal immigration law forbids any alien who has been deported from the United States from reentering or being found in the United States without prior approval from the Attorney General. 8 U.S.C. § 1326(a). One of the elements of a *prima facie* case of illegal reentry is evidence that would allow the fact-finder to find beyond a reasonable doubt that the defendant had been deported previously. Although the government need not show that the deportation was lawful, a defendant in a subsequent criminal prosecution may collaterally attack the underlying deportation if he effectively was denied judicial review of the administrative proceedings. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39 (1987) (affirming dismissal of indictments where defendants were denied judicial review of their deportation orders). Courts have established a two-prong test under *Mendoza-Lopez*: the criminal defendant must establish one, that he or she was denied the right to judicial review, and two, that the prior deportation proceeding was "fundamentally unfair," in other words, that procedural deficiencies prejudiced the defendant.

See United States v. Benitez-Villafuerte, 186 F.3d 651, 658 (5th Cir. 1999); *United States v. Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1485 (10th Cir. 1993); *United States v. Lopez-Vasquez*, 1 F.3d 751, 755-56 (9th Cir. 1993) (citing *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992)); *United States v. Fares*, 978 F.2d 52, 56-57 (2d Cir. 1992); *United States v. Holland*, 876 F.2d 1533, 1536 (11th Cir. 1989); *United States v. Santos-Vanegas*, 878 F.2d 247, 251 (8th Cir. 1989).

Following the Supreme Court's ruling in *Mendoza-Lopez*, Congress amended 8 U.S.C. § 1326 to permit a defendant in a criminal proceeding to challenge the validity of the deportation order if the alien demonstrates three things: (1) he exhausted any administrative remedies that may have been available to seek relief from the order, (2) the deportation proceedings at which the order was issued improperly deprived him of the opportunity for judicial review, and (3) the entry of the order was fundamentally unfair. *See* 8 U.S.C. § 1326(d)(1)-(3).

Unfortunately for Charleswell, he meets neither *Mendoza-Lopez*'s two prongs nor section 1326(d)'s three requirements. First, the defendant has not shown that he exhausted his available administrative remedies. On the contrary, he could have but did not appeal the immigration judge's erroneous

findings to the Board of Immigration Appeals. Second, the defendant failed to establish that he was unfairly denied judicial review of the November 7, 1991 deportation order. Indeed, the United States Court of Appeals for the Fourth Circuit determined that Charleswell had been informed of his right to appeal, yet for reasons that are unclear, he declined to exercise that right. As the Court of Appeals noted, "the immigration judge simply made a substantive error of law — albeit an egregious one — of precisely the sort that could have been corrected on appeal." *Charleswell*, at *6 n.*. There is no authority for this Court to reach back and correct that mistake. Accordingly, I must deny the defendant's attempt to suppress this deportation order or to dismiss the charge against him on this basis.

B. **Charleswell has not Established that he was Denied an Opportunity for Judicial Review of the July 24, 2001 Reinstatement Order**

Charleswell also challenges the July 24, 2001 order reinstating the November 7, 1991 deportation order, arguing that the reinstatement was improper because the vehicle under which the reinstatement took place, INA § 241(a)(5), codified at 8 U.S.C. § 1231(a)(5), did not become effective until after he

allegedly had reentered the United States.[5] The government acknowledges that courts are split on whether section 241(a)(5) was intended to be applied retroactively, but argues that the INS properly applied this provision in Charleswell's case.

The distinction that the government makes is that each of the courts that have considered the issue has done so on a direct appeal or a habeas petition from a reinstatement order itself — not, as is Charleswell's case here — on a collateral challenge to the reinstatement order in a criminal proceeding.[6] Here, 8 U.S.C. § 1326(d) delineates the standard a defendant must meet to

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[5] Section 305(a)(5) of IIRIRA became section 241(a)(5) of the INA and is codified at 8 U.S.C. § 1231(a)(5). This provision took effect on April 1, 1997, at least two weeks after Charleswell was arrested for having illegally reentered the country.

[6] *See, e.g.*, *Castro-Cortez v. INS*, 239 F.3d 1037, 1050-51 (9th Cir. 2001) (finding that, given the absence of any indication of Congressional intent on the issue, and that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," the provision could not be applied to aliens who had reentered the United States before April 1, 1997); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 866-67 (8th Cir. 2002) (reaching same conclusion); *Bejjani v. INS*, 271 F.3d 670, 687 (6th Cir. 2001) (same). *But see Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 300-02 (5th Cir. 2002) (finding no impermissible retroactive effect because § 241(a)(5) "does not deal with any vested rights or settled expectations arising out of alien's wrongdoing").

The United States Court of Appeals for the Third Circuit has held that there is no retroactive effect in applying this provision to an immigrant whose underlying deportation order was issued before the enactment of INA § 241(a)(5), but left open the question whether there would be a retroactive effect if the provision were applied to an alien, like Charleswell, who illegally reentered the United States before the enactment of section 241(a)(5). *See Avila-Macias v. Ashcroft*, Civ. No. 2001-4307, 55 Fed. Appx. 93, 99, 2003 U.S. App. LEXIS 1294 at **15 (3d Cir. January 23, 2003) (noting that an alien who had entered the United States "prior to the effective date of [section 241(a)(5)] . . . could plausibly argue that he did so believing that (1) he would be entitled to a hearing at which he could contest the legality of his underlying deportation order and (2) that he would be entitled to apply for discretionary relief").

challenge this reinstatement. First, under INA § 241(a)(5), there were no practicable administrative remedies that Charleswell could have exhausted. *See Castro-Cortez v. INS*, 239 F.3d 1037, 1045 (9th Cir. 2001). Second, as with the original deportation order, Charleswell has not demonstrated that he was denied judicial review of the reinstatement order. INA § 242(a)(1), codified at 8 U.S.C. § 1252(a)(1), provides the federal courts of appeal with jurisdiction over reinstatement orders. *See Avila-Macias v. Ashcroft*, Civ. No. 01-4307, 55 Fed. Appx. 93, 94, 2003 U.S. App. LEXIS 1294 at **2 (3d Cir. Jan. 23, 2003) (considering direct appeal of reinstatement order under INA § 242(a)(1)); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 294 (5th Cir. 2002) (same); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Castro-Cortez*, 239 F.3d at 1043-44 (9th Cir. 2001) (government conceding jurisdiction to review reinstatement orders under INA § 242(a)(1)).

As with the underlying deportation order, Charleswell has provided no evidence to this Court that he was denied access to judicial review, either through a direct appeal from the reinstatement order or a petition for habeas relief. Because he fails to meet the second prong of section 1326, there is no point in considering whether the reinstatement order in this case was

"fundamentally unfair." Having not sought judicial review of the reinstatement order, Charleswell may not now collaterally attack it. Accordingly, I will deny the motion to dismiss the reinstatement order.

III. CONCLUSION

Charleswell has not established that he was denied access to judicial review of either the November 7, 1991 deportation order, or the July 24, 2001 reinstatement thereof. Accordingly, I will deny the motion to dismiss the information and rule that the government may use both orders as evidence in this criminal matter.

ENTERED this 30th day of April, 2003.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion of even date, it is **HEREBY ORDERED** that the defendant's motion to dismiss the information [docket entry # 4] is **DENIED.**

ENTERED this 30th day of April, 2003.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

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